

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DEBORAH PRESSER and
STEVEN PRESSER,

Plaintiffs,

v.

Case No. 11-CV-11239
HON. GEORGE CARAM STEEH

FEDERAL NATIONAL
MORTGAGE ASSOCIATION,
BANK OF AMERICA, MORTGAGE
ELECTRONICS REGISTRATION
SYSTEMS, INC., and
BAC HOME LOANS SERVICING, LP,

Defendants.

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ORDER DENYING MOTION TO DISMISS (#10) WITHOUT PREJUDICE

On March 7, 2011, plaintiffs filed an action in Genesee County Circuit Court challenging their mortgage foreclosure. In their complaint, plaintiffs assert: (1) a quiet title claim; (2) an equitable estoppel claim; and (3) a claim for declaratory judgment setting aside the Sheriff's Deed. On March 28, 2011, the action was removed to this court. On November 10, 2011, defendants filed a motion to dismiss. The matter was fully briefed and oral argument occurred at a hearing on the motion on January 25, 2012. During the hearing, the court discovered that plaintiffs filed an amended complaint in state court on March 23, 2011. Plaintiffs presented an official court copy at the hearing. The amended complaint differs from the complaint. Counsel for defendants represented that he was not aware of the amended complaint nor was a copy filed with this court. On February 6, 2012,

defendants filed a supplemental brief in support of their motion to dismiss. Defendants claim plaintiffs never served the amended complaint, never filed a proof of service or notified defendants about the pleading, and never filed the pleading after defendants filed their dispositive motion. Defendants also argue that even if the amended complaint is properly before the court, the amended complaint should be dismissed as a matter of law.

Plaintiffs address the procedural issues raised by defendants in their response to defendants' supplemental brief. Plaintiffs attach the circuit court docket history, showing the amended complaint was filed on March 23, 2011. Plaintiffs also attach the affidavit of Julie Simison, an employee of plaintiffs' counsel's law firm. Simison attests she served a true copy of the summons, complaint, notice of lis pendens, and amended complaint on defendants on March 23, 2011 via first class mail, return receipt requested. The certified mail receipts are attached to her affidavit and show receipts from all the addressees except Fannie Mae's Chicago office. However, there is a certified mail receipt showing service on Fannie Mae's Washington, D.C. office. While defendants argue plaintiffs never filed a proof of service, Michigan Court Rule 2.104(B) provides that "[f]ailure to file proof of service does not affect the validity of service." The federal statute governing removal provides that a notice of removal shall be filed "together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." From the certified mail receipts, it appears defendants may have received the amended complaint the same day the notice of removal was filed. The amended complaint was not attached to the notice of removal and filed with this court as required.

Because defendants' motion to dismiss is based on the complaint, rather than the amended complaint, the motion (#10) is DENIED without prejudice. Plaintiffs are instructed

to file the amended complaint with this court by March 7, 2012. Failure to do so will result in dismissal. After filing of the amended complaint, defendants may file a renewed motion to dismiss, dealing specifically with the new allegations in paragraphs 18, 19, 42, and 43 of the amended complaint, by March 28, 2012. Plaintiffs may file a response to the motion to dismiss by April 11, 2012. The court will rule on the motion to dismiss without oral argument.

IT IS SO ORDERED.

Dated: February 27, 2012

S/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on February 27, 2012, by electronic and/or ordinary mail.

S/Josephine Chaffee
Deputy Clerk